STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

RURAL ELECTRIC CONVENIENCE COOPERATIVE) CO. and SOYLAND POWER COOPERATIVE, INC.) Complainant)	
vs.)	
)	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY) (AMEREN CIPS) Respondent)	
AND	DOCKET NO. 01-0675
FREEMAN UNITED COAL MINING COMPANY) Intervenor)	
vs.)	
)	
RURAL ELECTRIC CONVENIENCE COOPERATIVE) CO.) Counterrespondent)	

MOTION FOR SUMMARY JUDGMENT—*RES JUDICATA*

NOW COMES Freeman United Coal Mining Company ("Freeman"), by its attorney, Gary L. Smith, of Loewenstein, Hagen & Smith, P.C., and hereby moves for summary judgment against Rural Electric Convenience Cooperative Co. ("RECC") and submits the following:

INTRODUCTION

On October 30, 2001, RECC filed a 6-count complaint against Central Illinois Public Service Company ("CIPS") under the Electric Supplier Act (220 ILCS 30/1 et seq.) Attached to the Complaint as Ex. 1 is a copy of the February 19, 1969, Service Area Agreement ("Service Area Agreement") between RECC and CIPS, which was approved by the Commission (Freeman's Ans., Ct. I, pars. 4 & 5). RECC's complaint alleges that Freeman constructed an air shaft ("borehole") in RECC's

service territory at the "Arnold Premises," (Ct. I, par. 14) which RECC claims entitles it to provide electric service to Freeman's Crown III Mine pursuant to various theories under the Service Area Agreement with CIPS and the Electric Supplier Act ("Act."). Freeman admits that the borehole is located on the Arnold Premises, within the RECC's territory shown on the maps in the Service Area Agreement. Central to all of RECC's claims is the issue of whether or not electric service to Freeman's Crown III Mine borehole is new service. Both Freeman and CIPS have affirmatively alleged that the 34.5 KV line to the borehole at the "Arnold Premises" is not new service.

Attached to this motion are the following attachments.

Attachment 1	Commission Order in ESA 187
Attachment 2	Crown III Litigation *RECC v. Ill.Com.Com.*, 118 Ill.App.[3d] 647, 73 Ill.Dec. 1951 (1983)
Attachment 3	Affidavit of David Care
Attachment 4	Affidavit of Mike Caldwell
Attachment 5	Commission Order 89-0420 (Old Ben case)
Attachment 6	RECC's Answer to Freeman's Interrogatories 8, 11 and 13

The material facts are not in dispute and the case presents solely a question of law. Summary judgment is appropriate when the pleadings, depositions, and admissions on file, when viewed in a light most favorable to the non-moving party, reveal that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. E.g., *Ragan v. Columbia Mutual Insurance Co.*, 118 Ill.App.[2d] 342, 349, 233 Ill.Dec. 643 (1998). RECC's claims are barred as a matter of

law because the appellate court's decision in *RECC v. Ill.Com.Com.*, 183 Ill.App.[3d] 647, 73 Ill.Dec. 1951 (1983) is *res judicata*.

UNDISPUTED FACTS

RECC is a co-op engaged in the sale and distribution of electricity (Freeman's Ans., Ct. I, par. 1). CIPS is engaged in the business of generating and transmitting and distributing electricity (Freeman's Ans., Ct. I, par. 3) and both RECC and CIPS are electric suppliers within the meaning of the Act (Freeman's Ans., Ct. I, pars. 1 & 3). In ESA 187, a dispute arose between CIPS and RECC over which electric company would supply electricity to Freeman's Crown III Mine. The Commission ruled in favor of CIPS (see Att. 1, a copy of Commission ESA 187 Order), and RECC appealed. The appellate court affirmed. *RECC v. Ill.Com.Com.*, 118 Ill.App.[3d] 647, 73 Ill.Dec. 1951 (1983) (hereafter "Crown III Litigation"). (See Att. 2, the appellate court decision.)

Prior to June 2, 1965, the effective date of the Act, RECC provided electric service to customers at the Arnold Premises, legally described as the South Half of the Southwest Quarter of Section 7, Township 11 North, Range 5 West, in Macoupin County (Freeman's Ans., Ct. 1, par. 11). Attached to RECC's the Complaint is Ex. 4, a map delineating the Arnold Premises, which RECC has labeled on top as the "Crown III Mine Extension." The borehole was constructed because Freeman could not extend its underground distribution lines any further without severe loss of voltage. (Att. 3, Affidavit of Dave Care). Freeman has leased

a portion of the Arnold Premises from the present surface owner and has constructed a borehole from the surface to the Herrin No. 6 coal seam, which consists of thousands of underground acres of the coal reserves as a part of the Crown III Mine. (Att. 4, Affidavit of Mike Caldwell.)

The Crown III Mine facilities and equipment at the borehole consist of an electric substation, rock dust injection facility and access area. All of these facilities are part of the coal mining process. (Att. 4, Affidavit of Mike Caldwell.) Under the Service Area Agreement and maps attached thereto, the Crown III Mine borehole is in RECC's territory. (Freeman's Ans., Ct. I, par. 14). The borehole is within an unincorporated area (Att. 4, Affidavit of Mike Caldwell). Freeman possesses the mineral rights to the coal reserves below the Arnold Premises, and possessed those mineral rights as part of the Crown III Mine at the time of the proceeding in the Crown III Litigation. (Att. 4, Affidavit of Mike Caldwell.)

RECC alleges that the electric load for the Crown III Mine requires, in accordance with accepted engineering practices, a connection to or extension from a 34.5 KV or higher line. The portion of the Freeman Crown III Mine located at the borehole is presently served by a 34.5 KV or higher line by CIPS at the borehole and the mine requires that service. (Att. 3, Affidavit of David Care.)

THE "OLD BEN" CASE

For years, the Commission has followed its decision in 89-0420 in what has been commonly referred to as the "*Old Ben*" case. (Att. 5, Order 89-0420.) Old Ben

developed an underground mine in 1962 and entered into an electric service contract with CIPS for CIPS to furnish electricity to Old Ben's Mine No. 24. CIPS provided power for over 27 years as the mine's underground operations developed. CIPS had a Service Area Agreement with Southeastern Electric Co-op similar to the Service Area Agreement in the instant case. That agreement provided that neither party would provide electric service in the other's territory "except those consumers the constructing party is otherwise entitled to serve."

When Mine 24 was first constructed, Old Ben installed its own underground distribution lines from the CIPS connection point, but as Mine 24 developed its operations into the area designated on the map as belonging to Southeastern, Old Ben was unable to increase the capacity of the distribution lines to meet its load requirements. Old Ben requested CIPS to provide electric service to drill hole No. 7 at the surface. When CIPS provided electrical service to drill hole No. 7 as part of Mine 24, Southeastern objected and claimed the exclusive right to serve drill hole 7 as part of its service area under the Service Area Agreement. CIPS responded citing the exception in the contract allowing CIPS to serve consumers it was, "otherwise entitled to serve."

The Commission noted that the service requirements of Mine 24 involved a transient load moving as the mining operations progressed. The service at drill hole No. 7 was a portion of the same load CIPS had provided to Old Ben for 27 years. The Commission held that CIPS was the proper electric supplier for drill hole 7

because that was part of Old Ben's Mine 24 that CIPS was entitled to serve under the pre-June 2, 1965 contract even though drill hole 7 was in Southeastern's service area.

In interpreting the Service Area Agreement, the Commission noted that there was no dispute that CIPS was entitled to serve Old Ben 24 from its previous service point located in CIPS' service area. The Commission interpreted the language in the *Service Area Agreement as indicating that the parties intended that each* was authorized to extend service into the other's area to provide electrical service to the premises of a customer of the contracting supplier existing as of the date of the execution of the Service Area Agreement. Therefore, CIPS had a right to supply electric service to drill hole No. 7.

Likewise, in the instant case, there is no dispute that CIPS is entitled to serve Freeman at the connection point established under the Crown III Litigation. Had Freeman been able to extend its own distribution line further underground without losing voltage, RECC would not have filed this complaint. The same result holds true for CIPS service to the Crown III Mine at the borehole. It's the same service to the same customer as the last 20 years. Like the Service Area Agreement in the *Old Ben* case, Paragraph 5 of the Service Area Agreement here provides that nothing prohibits CIPS from constructing <u>new lines</u> through RECC's service area to serve any customer CIPS is "otherwise entitled to serve." Although there is no pre-July 2, 1965 contract here, the outcome of the Crown III Litigation entitled CIPS to serve Freeman's Crown III Mine and entitled CIPS to serve Freeman's borehole on the

Arnold Premises in the same manner that CIPS was entitled CIPS to serve drill hole No. 7 for Old Ben.

RES JUDICATA

Res judicata precludes subsequent litigation between the same parties on a claim after final judgment on the matter. In order to invoke this defense, the following elements must be shown:

(1) That a court of competition jurisdiction rendered a final judgment on the merits;

(2) That there is an identity of parties or their privies in action; and

(3) There is an identity of cause of action.
Downing v. Chicago Transit Authority, 162, Ill.App.[2d] 70, 73-74, 204 Ill.Dec. 775 (1994).

R*es judicata* applies to administrative decisions, *Osborn v. Kelly*, 207 Ill.App.[3d] 488, 152 Ill.Dec. 422 (1991) (retaliatory discharge action by an employee was barred by *res judicata*, since in an earlier unemployment compensation proceeding it was determined that the employee voluntarily quit), and the judgment in the administrative hearing is conclusive, not only as to matters actually decided, but also as to all issues that could have been decided. *E.g.*, *Bagnola v. Smithkline Beecham Lab, 333* Ill.App.[3d 711], 267 Ill.Dec. 358. (2002).

1. FINAL JUDGMENT ON THE MERITS

In ESA 187, CIPS and RECC litigated over the proper electric supplier to serve Freeman's Crown III Mine. The Commission entered an order declaring CIPS as the electric supplier in that case (see Att. 1 ESA 187 order). In *RECC v.*

Ill.Com.Com., 118 Ill.App.[3d] 647, 73 Ill.Dec. 1951 (1983) the appellate court entered judgment affirming the decision of the Commission in ESA 187. That judgment was a final judgment on the merits. There can be no doubt that there was a final judgment on the merits in the Crown III Litigation. The appellate court's decision in that case is binding on RECC and all inferior tribunals. *Garcia v. Hynes*, 29 Ill.App.[3d] 479, 481, 331 N.E.[2d] 634 (1975); *People v. Thorpe*, 52 Ill.App.[3d] 576 (1977).

2. IDENTITY OF PARTIES

In the appeal of RECC v. Ill.Com.Com., *supra*, the same parties were involved as in the present case. Therefore, there are identical parties here as there was in the Crown III Litigation and this requirement is met as well.

3. IDENTITY OF CAUSE OF ACTION

The Illinois Supreme Court in *River Park, Inc. v. City of Highland Park*, 184 Ill.[2d] 290, 234 I.. Dec. 783 (1998) adopted the *transactional test* for determining whether identity of causes of action exist for purposes of *res judicata*. Under the transactional test, claims are part of the same cause of action if they arise from the same transaction or series of connected transactions. Subsequent claims may therefore be barred if they originate from a single group of operative facts.

In *Cload v. West*, 328 Ill.App.[3d] 946, 263 Ill.Dec. 35 (2002), the appellate court noted that the transactional test directs that claims be considered in factual rather than evidentiary terms and the court should assess whether the facts are linked together in such a manner that they are part of a single transaction. The question

then becomes whether the facts indicate that a single unit conforms to the parties' expectations and business usage or understanding. The test is to be applied pragmatically. In the instant case, it is clear that all of RECC's present claims arise from the same group of operative facts as the Crown III Litigation.

Boreholes are extensions of the mining operation that occur as mining operations extend further away. Were it possible for Freeman to extend its own underground electrical system to the perimeter of its mining property, there would be no need for surface boreholes. What precludes Freeman from extending its lines underground are the voltage losses which occur when electric current requirements increase as the distance of extended lines increases. Voltage deterioration beyond nominal levels causes operating problems in the underground mining equipment. (Att. 3, Affidavit of Dave Care.)

Had Freeman been able to extend its own underground electric distribution system further, RECC would have no claim. The same holds true for the service to the borehole. The underground electric load used in the Crown III Mine is at many places at any one time. (Att. 3, affidavit of Dave Care.) Electric conveyors used to move the coal from where it is being mined back to the main shaft and lighting and mining machinery are located over several miles underground at any one time. (Att. 3, affidavit of David Care). This is the same service as was decided in the Crown III Litigation.

The ESA 187 ordering paragraph states:

> IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Central Illinois Public Service Company be, and it is hereby, authorized to provide electric service at 34.5 KV to the Crown III mine of the Freeman United Coal Mining Company in Section 1, Township 11 North, Range 6 West of the Third Principal Meridian in Macoupin County, Illinois. (See Att. 1)

RECC assumes (without stating) that the scope of the Commission's earlier decision in the Crown III Litigation was limited solely to the area below the surface of Sec. 1, Twp. 11 N., R. 6 W. of the Third P.M. in Macoupin County presuming that when the mine proceeded underground beyond those surface boundaries, that somehow created a right for RECC to provide service to the Crown III Mine. Such a result is absurd and contrary to the Crown III Litigation and inconsistent with the *Cload* directive to apply the transactional test pragmatically. Both RECC's present claim and its prior claims decided in the Crown III Litigation constitute a single transaction and therefore the instant complaint is barred as *res judicata*.

In the Crown III Litigation, RECC's claims were based upon the same February 19, 1969 Service Area Agreement that RECC now relies upon. After considering various claims by RECC, the Commission and appellate court in Crown III Litigation determined that CIPS had the right to serve the Crown III Mine. Both decisions specifically describe the mining activity as part of a continuously moving underground distribution system in need of electrical power. Both decisions mention that Freeman owns 810 surface acres and over 17,500 acres of underground coal

rights. These facts indicate, *per force*, that all parties to the Crown III Litigation were aware that eventually as the mine developed, Freeman, as a customer of CIPS, would use an electrical load not under Freeman's 810 acres, but under RECC's service territory. Clearly and unambiguously, the facts in the Crown III Litigation contemplated a continuously moving underground mine that would expand beyond Freeman's 810 acres to areas well under RECC's service area.

Under the supreme court's transactional test, the evidence for both causes of action need not overlap, but must only *arise* from the same transaction. In the instant case it is clear that RECC's present complaint *arises* from the same set of facts as in RECC's initial claim to serve the Crown III mine over 20 years ago. The Commission authorized CIPS to serve the Crown III Mine and now, as the mine has developed, the production of that mine has moved to areas underneath the Arnold Premises. Accordingly, CIPS has moved the electrical lines to conform to Freeman's Crown III mining needs just as was the case in *Old Ben* drill hole 7. The need for electric service to reach to outer boundaries of the Crown III Mine was reasonably foreseeable at the time of the Crown III Litigation because the parties knew that Freeman's coal reserves required the mining process to continue through Freeman's 17,500 underground acres of coal. The borehole in the instant case is nothing more than the same service to Freeman's Crown III Mine as contemplated in the Crown III Litigation and there is an identity of causes of action for *res judicata*.

COUNT II – SECTION 2 OF SERVICE AREA AGREEMENT

Count I of RECC's complaint asserts 14 allegations common to all counts of the complaint and does not establish a separate cause of action. Count II is a claim under section 2 of the Service Area Agreement between CIPS and RECC. Attached to RECC's complaint as Ex. 1 is the Service Area Agreement dated February 19, 1969.

Both CIPS and RECC are electric suppliers under the Act (Freeman's Ans., Ct. I, pars. 1 & 3). The complaint defines the Arnold Premises in a metes and bounds description and on a map (Ex. 4 attached to RECC's complaint). All parties admit that the Arnold Premises is located in an unincorporated area (Att. 4, Affidavit of Mike Caldwell) and within a territory delineated by the Service Area Agreement between RECC and CIPS in RECC's territory (Freeman's Ans., Ct. I, par. 14) and that the Service Area Agreement was approved by the Commission under Section 6 of the Act (Freeman's Ans., Ct. I, par. 4).

In Count II RECC claims that under paragraph 2 of the Service Area Agreement, "RECC is the only electric supplier as between RECC and CIPS that is entitled to serve the Freeman Mine lime injection/air shaft." This claim is based purely on location of the borehole in RECC's service area on the maps in the Service Area Agreement. Serving continuously moving underground power loads is entirely different than the fixed service on the surface contemplated by the Service Area

Agreement. The Commission's order in ESA 187 anticipated that the mine electric load would migrate underground throughout the 17,500 acres of coal reserves.

RECC assumes that the Crown III Mine borehole is new service in RECC's territory. RECC is wrong as a matter of law. Exhibits attached to pleadings are considered part of the pleadings for all purposes where the pleading is founded on such exhibits. (Ill.Rev.Stat. 1989 ch. 110, par. 2-606.) Allegations in the pleading which conflict with the exhibits are not admitted as true but, rather, the exhibit controls. (*McCormick v. McCormick* (1983), 118 Ill.App.3d 455, 460. 74 Ill.Dec. 73, 455 N.E.^{2d} 103.) Exhibit 4 attached to RECC's complaint affixes markings in Section 7 of Township 11, Range 5 West where the Arnold Premises is located and Ex. 4 is entitled "Crown 3 Coal Mine Expansion." RECC has admitted that the borehole is an expansion of the Crown III Mine. The borehole is the same service to the same customer as part of Freeman's continuous mining needs as the Commission found in ESA 187.

The Service Area Agreement in paragraph 5 states:

> Nothing herein contained shall prohibit either Co-operative or Utility from hereafter constructing new lines and thereafter maintaining the same, when necessary, through the service area or areas of the other, provided no service be extended from such lines, or any of them, to any consumers except those consumers that constructing party is otherwise entitled to serve. (Emphasis added.)

The Commission determined that CIPS was the electric supplier entitled to serve Freeman's Crown III Mine and the borehole at the Arnold Premises is nothing more than the natural evolution and the development of the same mine at its

underground location. Freeman is not a new consumer but the same consumer that CIPS is "otherwise entitled to serve" under the Crown III Litigation.

Illinois law broadly defines a coal mine. 225 ILCS 705/1.03 states:

> 'Mine' and 'coal mine' mean any area of land and any structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, including the method known as carbon recovery, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

It is clear from the definition of "coal mine" that the borehole at the Arnold Premises is simply part of the Crown III Mine.

In *RECC v. Ill.Com.Com.*, 118 Ill.App.[3d] 647, 73 Ill.Dec. 1951 (1983) RECC appealed this Commission's decision in ESA 187 to the appellate court and one of RECC's arguments involved Section 2 of the same Service Area Agreement. The appellate court noted that section 2 of the Service Area Agreement provided an exception where the load to be supplied was to be determined through a connection and/or extension as of an existing July 2, 1965 line having a voltage of 34.5 KV or higher, the supplier is to be determined under the Act. The court held that the prior interpretation of the Service Area Agreement in the *Crown II Litigation*[1], controlled and that the right to serve must be decided under the provisions of the Act. The

[1] *RECC v. Ill.Com.Com., 56 App.[3d] 281, 14 Ill.Dec. (1977),* judgment vacated on other grounds and remanded with directions. 75 Ill.[2d] 142, 25 Ill.Dec. 794 (1979), aff'd. on appeal from remand, *RECC v. Ill.Com.Com.*, 109 Ill.App.[3d] 243, 64 Ill.Dec. 852 (1982).

court and Commission decided RECC's Section 2 argument adversely to RECC and this RECC's claim under Count II is barred as *res judicata.*

COUNT III—SECTION 5 OF THE ACT

In Count III RECC alleges that the load required by Freeman in its Crown III Mine during the first year of normal operation will require (as determined by accepted engineering practices) a connection to or extension of a 34.5 KV or higher line and that under those circumstances, the Service Area Agreement requires that the supplier be determined under the Act (Ct. III, par. 15). RECC then claims it is grandfathered under section 5 of the Act to provide all of the electric service to the Crown III Mine borehole because RECC has provided electrical service to the Arnold Premises since 1938 and was providing such service on July 2, 1965 (Count III, par. 17).

This same claim was decided over 20 years ago adversely to RECC and cannot be relitigated here. The Arnold Premises is presently served by a single phase 7.24 KV service . (RECC's Ans. to Freeman's Interrog. Nos. 11 & 12, Att. 6.) On July 2, 1965, the effective date of the Act, the Arnold Premises had 7.24 KV service. (See RECC Ans. to Freeman Interrog. No. 13, Att. 6.) RECC does not have present facilities sufficient for 34.5 KV service and would have to contract with another provider to serve the Crown III borehole. (See RECC Ans. to Freeman's Interrog. No. 8, Att. 6.)

RECC's claim in Count III equates the farmhouse service to the Arnold Premises in 1938 and today with that of the huge industrial demands of Freeman's Crown III Mine. In *RECC v. Ill.Com.Com.,* 56 Ill.App.^{3d} 281, 371 N.E.^{2d} 1143 (1977), judgment vacated on other grounds and remanded with directions, 75 Ill.^{2d} 142, 25 Ill.Dec. 794 (1979) RECC asserted the same argument. There the court said:

> Even if Rural Electric was in fact furnishing rural and domestic power to this section, we do not conclude that farm buildings served by low voltage distribution lines and a coal mine requiring a 34.5 KV line can be equated as the same customer at the same location under the intent of section 5 of the Electric Supplier Act. * * * If such an intent were to be attributed to the Act, it would have the effect of allowing an electrical supplier the absolute right to serve an area in which it was providing minimal service even though the new customer might require service of a completely different magnitude which would be entirely beyond the scope of the minimal supplier.

This same argument was likewise rejected in the Crown III Litigation where RECC attempted to equate service to the Marvin Moore farm with the 34.5 KV or higher transmission service required by Freeman's Crown III Mine. The appellate court held that the low voltage to the Marvin Moore farm was inadequate to invoke the priority provision of section 5 of the Act (See Att. 2). The Crown III Mine's power demand was at least 700 times the amount required by the Moore farm. The appellate court held that these types of farm customers and large industrial customers are not equal. RECC's claim under count III, section 5 of the Act, was decided in the Crown III Litigation and is barred as *res judicata.*

COUNT IV—SECTION 8 OF THE ACT

In count IV, RECC asserts that, when the customer's need for power is from a 34.5 KV line or higher, the Service Area Agreement requires a determination under the Electric Supplier Act. In Count IV, par. 17, RECC alleges that it has lines and facilities that existed on July 2, 1965 in *closer proximity* to the Arnold Premises than CIPS' facilities and that RECC's facilities can be made or are adequate for Freeman's power needs. This argument, too, could have been presented in the Crown III Litigation, but RECC conceded that case that it was not entitled to serve under Section 8.

In the appellate court's Crown III opinion, the court stated:

> RECC contends that, if it does not have a "grandfathered" right under section 5(a) of the Act, to serve the mine, then CIPS must prevail as RECC does not claim it is entitled, under section 8 of the Act, to serve the mine.

Res judicata bars not only those issues that were actually litigated in the prior suit; it bars those that could have been raised as well. *Rein v. David A. Noyes & Co.*, 172 Ill.App.^{2d} 325 (1996). In the Crown III Litigation RECC conceded that it did not have a right under section 8 and it is now barred from claiming to serve under section 8 under the *Cload v. West* transactional test. Clearly the Crown III Mine decision contemplated Freeman mining approximately 17,500 acres of coal surrounding its 810 surface acres. Now that the mine has extended out to an area below the Arnold Premises, RECC cannot now at this late date come in and assert a

section 8 claim under the Act. RECC is barred by the doctrine of *res judicata* from asserting a section 8 action here.

COUNT V—SECTION 1 OF THE SERVICE AREA AGREEMENT

In this count RECC asserts that under Sec. 1 of the Service Area Agreement, it is entitled to continue to serve customers that it was serving at locations on July 2, 1965. RECC claims that since it was providing electrical service to the Arnold Premises on the date of the Act and that since Freeman's facilities are on the Arnold Premises, RECC has an absolute right to serve the Crown III Mine as its "location."

In the Crown III Litigation, RECC asserted a section 1 argument after the case was marked "heard and taken." It continued to assert a section 1 claim on appeal. The appellate court held that RECC could not "mend its hold" and shift positions to attack the contract. The court stated:

> We conclude therefore, that RECC should not 'mend its hold' and that RECC's claim of a right to serve the Crown III Mine pursuant to paragraph 1 of the service area agreement should not have been considered by the trial court.

Therefore, RECC's section 1 claim as stated in count V is barred by the doctrine of *res judicata* as an untimely claim that RECC asserted in the Crown III Litigation. *Res judicata* bars not only those issues that were actually litigated in the prior suit; it bars those that could have been raised as well. *Rein v. David A. Noyes & Co.*, 172 Ill.App.^{2d} 325 (1996). Since the Commission designated Freeman as CIPS'

consumer, CIPS had every right to continue service and construct lines to serve the Crown III Mine borehole. Count V is barred under the doctrine of *res judicata*.

COUNT VI—SECTION 2 OF THE SERVICE AREA AGREEMENT AND MAPS

In this count, RECC alleges that the mine's electrical requirements are not required to be supplied through a July 2, 1965 connection/extension of a 34.5 KV or higher line, but can instead be served by a 34.5 KV or higher line that was not in existence on July 2, 1965. Again, this is too little, too late, and this claim was merged in the Crown III Litigation. At no point in time did RECC allege in the initial litigation that the Crown III Mine could be served by 34.5 KV or higher line that was not in existence on July 2, 1965. Its claim is barred because such a claim could have been asserted in RECC's initial complaint, but was not. CIPS has continued to extend its service to the outer parameters of the mine and, RECC is barred from claiming 34.5 KV or higher service to the mine could have been obtained from another source. As with Count IV and Count V, *Res judicata* bars not only those issues that were actually litigated in the prior suit; it bars those that could have been raised as well *Rein v. David A. Noyes & Co.*, 172 Ill.App.^{2d} 325 (1996). Since the Commission designated Freeman as CIPS' consumer, CIPS had every right to continue service and construct lines to serve the Crown III Mine borehole. Count VI is barred under the doctrine of *res judicata*.

WHEREFORE, Freeman United Coal Mining Company respectfully prays that the Commission enter an order on all counts declaring CIPS to be the proper electric

supplier based on *res* judicata, and for such other and further relief as the Commission deems just.

Respectfully submitted,

FREEMAN UNITED COAL MINING COMPANY

By: _____
Gary L. Smith

Gary L. Smith-#2644029
Loewenstein, Hagen, & Smith, P.C.
1204 South Fourth Street
Springfield, IL 62703
Phone: 217/789-0500
Fax: 217/522-6047

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon of all parties to the above cause on this 5 day of December, 2002 by U.S. mail by enclosing the same in an envelope addressed to such party at their address as follows:

Jerry Tice
Grosboll, Becker, Tice & Reif
101 East Douglas
Petersburg, IL 62675
gbtr@fgi.net

Steven R. Sullivan, Vice President
Central Illinois Public Service Company
Post Office Box 66149
St. Louis, Missouri 53166-6149
srsullivan@ameren.com

Robert J. Mill
Central Illinois Public Service Company
607 East Adams Street
Springfield, IL 62739
bob_mill@ameren.com

Scott C. Helmholtz
Atty. for Ameren CIPS
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
Post Office Box 5131
Springfield, IL 62705
schelmholz@sorlinglaw.com

David Stuva, President
Rural Electric Convenience Cooperative
Post Office Box 19
Auburn, IL 62615-0019
fax-438-3212

Donald Woods
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois

Gary L. Smith

ATTACHMENTS

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